FARAD CONTINUATION SHEET

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE,

NAGUR BENCH, NAGPUR.

DISTRICT:

Criminal Application No.317/2006 In

Criminal Writ Petition No.702/2005

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Office Note, Office Memoranda of Coram, appearance, Court's Orders or directors and registrar's orders

Court's or Judge's orders

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Mr. P.C. Madkholkar, Adv. for applicants.
Mr. S.G. Loney, APP for respondent nos.1 and 2.
Mr. S.D. Dewani, Adv. for respondent no.3

Coram : D.S. Zoting & A.P.Lavande, JJ.
Order Reserved on 28/2/2006.
Order Pronounced on 3/3/2006.

1. By this application, the applicants who are the original petitioners seek review of the Judgment and Order dated 23.1.2006 passed by this Court in Criminal Writ Petition No.702/2005.

2. The applicants filed the above Criminal Writ Petition challenging the appointment of Advocate Avinash Gupta as Special Public Prosecutor for conducting Sessions Trial and incidental proceedings arising out of Crime No.204 of 2004 by Notification dated 4.9.2004 issued by respondent no.1 herein. The main challenge in the above Criminal Writ Petition was that the appointment of Advocate Avinash Gupta as Special Public

Prosecutor was made contrary to the judgment of the Apex Court in **Mukul Dalal and others Vs. Union of India and others reported in ((1988) 3 Supreme Court Cases 1446)**. The grievance of the applicants was that the appointment of Advocate Avinash Gupta as Special Public Prosecutor was made at the behest of the complainant and the complainant was permitted to pay fees of Advocate Avinash Gupta which were quantified at Rs. 25,000/-. While disposing of the said Criminal Writ Petition, this Court held that the appointment of Advocate Avinash Gupta as Special Public Prosecutor was made in terms of Rule 22 as it stood then and also the same was not contrary to the directions and observations given in Mukul Dalal's case.

3. We have heard Mr. Madkholkar, learned counsel for the applicants, Mr. Loney, learned Additional Public Prosecutor for respondent nos. 1 and 2 and Mr. Dewani, learned counsel for respondent no.3.

4. Mr. Madkholkar, learned counsel appearing for the applicants submitted that the judgment of this Court runs contrary to directions and observations given in Mukul Dadal's case. He further submitted that no material was placed before the Appointing Authority to justify the appointment of Shri Avinash Gupta as Special Public Prosecutor in the matter. He further submitted that the finding given by this Court while disposing of the said Criminal Writ Petition that a private complainant can be allowed to pay fees of Special Public Prosecutor runs counter to

Mukul Dalal's case. He further submitted that the judgment of this Court is also contrary to the Division Bench judgment passed by this Court in Criminal Writ Petition No.1899 of 2004 and Criminal Writ Petition No.290 of 2005 decided on 26.4.2005 in which it has been held that the reasons have to be given in the order appointing Special Public Prosecutor and further that private complainant cannot be permitted to pay the fees of Special Public Prosecutor. In support of his submissions, the learned counsel relied upon the following judgments:-

1 AIR 1963 Supreme Court 1909 (Shivdeo Singh and others Vs. State of Punjab and others);

2 (1997) 6 Supreme Court Cases 450 (Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P)Ltd. and another);

3 AIR 2000 Supreme Court 1651 (Lily Thomas vs. Union of India);

4. (2004) 5 Supreme Court Cases 568 (State of Orissa Vs. Dhaniram Luhar); and

5 2005 AIR SCW 230 (Board of Control for Cricket, India and others Vs. Netaji Cricket Club and others).

5. Per contra, Mr. Loney, learned Additional Public Prosecutor appearing on behalf of respondent nos. 1 and 2 submitted that no review is permissible on the grounds mentioned in the review application by the applicants. He further submitted that the fact that a Division Bench of this Court has taken a contrary view cannot be a ground for filing review application. Therefore, he submitted

that the review application deserves to be dismissed in limine.

6. Mr. Dewani, learned counsel appearing for respondent no. 3 submitted that review jurisdiction can be exercised on the ground that there is some mistake or error apparent on the face of the record, or on the ground of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was passed and no ground exists for exercising review jurisdiction. He further submitted that the interpretation of Rule 22 of the Rules under which the appointment of Advocate Avinash Gupta as Special Public Prosecutor did not come for interpretation before the Division Bench of this Court upon which reliance has been placed by the applicants. Therefore, there is no warrant for granting review sought by the applicants. In support of his submissions, he relied upon the following judgments:-

1 AIR 1980 Supreme Court 2041 (Col. Avtar Singh Sekhon Vs. Union of India and others); and

2 AIR 2000 Supreme Court 1651 (Lily Thomas vs. Union of India.

7. We have considered the submissions made by the learned counsel appearing for the parties. We have perused the records. We have gone through the authorities upon which reliance has been placed by the learned counsel for the parties.

8. While disposing of Criminal Writ Petition No.702/2005 we have considered all the submissions made by the learned counsel appearing on behalf of the applicants as well as respondents.

After considering the judgment of the Apex Court in Mukul Dalal's case (supra) and Rule 22 as it stood then, under which the appointment of Advocate Gupta was made as Special Public Prosecutor, we held that the said appointment was not contrary to the judgment of Apex Court in Mukul Dalal's case and the same was in terms of Rule 22 of the Rules. Insofar as the fees payable to Special Public Prosecutor the argument made on behalf of the applicants that the same were not fixed by the Legal Remembrancer was rejected. In judgment dated 23.1.2006 reference to paragraphs 9 and 10 in Mukul Dalal's case was made and after considering the same, we held that the appointment of Shri Avinash Gupta as Special Public Prosecutor was not contrary to the ratio laid down in Mukul Dalal's case. We also held that the appointment was in terms of Rule 22 of the Rules. Therefore, we do not find any merit in the submission of Mr. Madkholkar that the said findings can be reviewed by exercising review jurisdiction. It is well settled that review jurisdiction can be exercised on the ground that there is some mistake or error apparent on the face of the record, or on the ground of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was passed.

9. In our opinion, none of these grounds is available in the present case. Insofar as the judgment of the co-ordinate bench delivered in Criminal Writ Petition 1899/2004 and 290/2005 is concerned, it is pertinent to note that in the said judgment the issue was not whether the appointment of Special Public Prosecutor in

terms of Rule 22 as it existed prior to amendment in 2004. Moreover, we are in agreement of the submissions made by the learned counsel for the respondents that no review can be allowed on the ground that the judgment of this Court is contrary to an earlier judgment of the co-ordinate bench which was not even relied upon by the parties. Therefore, in our view, the review application filed by the applicants is without any merit and the same is liable to be rejected.

10. In the result therefore, we do not find any merit in the review application. Therefore, the same is rejected with no order as to costs.

JUDGE **JUDGE**

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